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IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

GENERAL MEDIA COMMUNICATIONS, INC., *et al.*,
Petitioners,

v.

WILLIAM S. COHEN, SECRETARY OF DEFENSE, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF PETITIONERS IN REPLY TO BRIEF FOR THE RESPONDENTS IN OPPOSITION

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MISCELLANEOUS

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The government's opposition highlights why review of the decision below is critical. The government expressly acknowledges that the decision below has broad implications for speech not only in military exchanges but also in "public universities, libraries [and] museums." Opp. 14. The government also acknowledges that the rationale of the decision below would enable the government to ban speech, in all of those fora, on the basis of *content*. *Id.* at 16. Thus, this case is not simply about lawful "lascivious" speech in military exchanges. If the decision below were correct, the government tomorrow could ban the sale in numerous fora of books or magazines about racial issues, or politics, or abortion, or any other subject matter the government chose to ban. This sweeping encroachment on speech plainly warrants review, and nothing in the government's rote defense of the decision below suggests the contrary. In addition to supporting the rationale of the decision below, the government's opposition urges alternative grounds in support of that decision which, if adopted, would fundamentally alter current public forum and viewpoint discrimination analysis.

1. What little defense the government attempts of the court of appeals' public forum rationale simply highlights the confusion in public forum doctrine, the errors of the court below in applying that doctrine, and the need for this Court's review.

a. The court below and the government's opposition wrongly assert that exchange newsstands are nonpublic fora simply because they bring the government income. For example, the court below concluded that, "because military exchanges are 'engaged in commerce,' " it could divine governmental intent not to create a designated public forum. Pet. App. 12a. The relevant question, however, is not whether the government earns money. Instead, in ascertaining whether governmental property on which money is exchanged is a designated public forum or a nonpublic forum, the relevant question is whether the government operates the property—here exchange newsstands —solely for the "purpose of raising revenue or facilitating the conduct of [the government's] own internal business,"

or whether "the government acted for the purpose of benefitting the public." *New York Magazine v. Metropolitan Transp. Auth.*, 136 F.3d 123, 129 (2d Cir. 1998); *Air Line Pilots Ass'n Int'l v. Department of Aviation of the City of Chicago*, 45 F.3d 1144, 1153 (7th Cir. 1995). If the former, the forum is nonpublic; if the latter, it is a designated public forum. Had the court below applied the proper analysis, it would have been forced to conclude that exchange newsstands are designated public fora, because it is undisputed that the newsstands were not opened solely to raise revenue. Indeed, it is clear from the record that they are designed expressly "for the purpose of benefitting" retired and active duty military personnel and their relatives. *See* Pet. 1-5.

The manner in which exchanges historically have been operated confirms that their purpose is not solely to raise revenue. As courts have recognized, if the government makes decisions about which speech to exclude from a forum based on the potential impact of the speech on the revenue stream, that "indicates that making money is the main goal." *New York Magazine*, 136 F.3d at 130. Critically, however, if speech that creates "the possibility of clashes of opinion and controversy" historically has been allowed in a forum, that demonstrates an intent to create a designated public forum, because allowing such controversial material in a forum charged solely with raising revenue would be "inconsistent with sound commercial practice." *Id.* The government does *not* assert that it wants to ban sexually oriented material from exchanges because such material might adversely impact sales. Nor could it. The undisputed evidence shows that such material is offered in exchanges precisely because customers demand it. *See* Pet. 4-5. It is also undisputed that exchanges historically have sold material that is controversial and that might cause some patrons to shop elsewhere.

b. The court below and the government here fail to come to terms with this Court's designated forum jurisprudence in two additional respects. First, this Court has made clear that a designated public forum need not be opened to the

public at large, or for all expressive activity. *See, e.g., Widmar v. Vincent*, 454 U.S. 263 (1981); *City of Madison Joint Sch. Dist. v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167 (1976). In finding that exchange newsstands are nonpublic fora, the court below nonetheless relied on the fact that exchanges are open only to a select group. Pet. App. 12a. In its opposition, the government similarly relies on the fact that "[t]he general public is not permitted to enter military exchanges." Opp. 16. Relegated to a footnote is the government's acknowledgment that designated or limited public fora even exist. Even the footnote, without citation and in contravention of this Court's decisions, insists that, where access is limited, "a strong inference should arise that the government did not intend to create a public forum." *Id.* at 17 n.6.

The court below and the government in its opposition similarly misapprehend the nature of a *designated* public forum. The government wrongly asserts that "the necessary consequence of creating a public forum is to provide access to *all* speakers." Opp. 16 (emphasis added). It thus argues that the use of neutral criteria such as demand or shelf space to limit the number of speakers demonstrates that no designated public forum has been created. *Id.* at 17 (citing *Arkansas Educ. Television Comm'n v. Forbes*, No. 96-779, slip op. 11 (U.S. May 18, 1998)). This mirrors the decision of the court below, which found no public forum existed because there is far more material printed than "the shelves of an exchange can hold." Pet. App. 12a. But no case has suggested that a forum generally open to expressive activity within neutral boundaries set by the government—as exchange newsstands are—is not a designated public forum. Only when the government does not allow general access—whether to the public at large or to a specified group—but instead allows speakers access to its property on a case-by-case basis, is a forum nonpublic. *See Arkansas Educ.*, slip op. at 11 ("A designated public forum is not created when the government allows selective access for individual speakers rather than general access for a *class* of speakers.") (emphasis

added). Indeed, under this view, no designated public forum ever could be created because, by definition, a designated public forum is opened to use only by a limited group, or for a limited purpose.

Nor does the opinion below or the government's opposition come to terms with the fact that, once it has created a designated public forum, the government cannot reverse that course by deciding to exclude material because of its content. "[I]t cannot be true that if the government excludes any category of speech from a forum . . . that forum becomes ipso facto a non-public forum . . . . This reasoning would allow every designated public forum to be converted into a non-public forum the moment the government did what is supposed to be impermissible in a designated public forum, which is to exclude speech based on content." *New York Magazine,* 136 F.3d at 129-30 (citation omitted).

c. In its opposition the government simply ignores the court of appeals' conclusion that, because the military has not " 'abandoned any right to exclude civilian traffic and any claim of special interest in regulating expression,' " military exchanges "are nonpublic forums." Pet. App. 13a. Instead, the government resorts to misstating petitioners' position, claiming that petitioners assert mere government inaction has created designated public fora in exchange newsstands. Opp. 14-16. Indeed, the government claims that "[p]etitioners do not even attempt to demonstrate that Congress, or the Executive, has 'intentionally open[ed]' [military exchanges] 'for indiscriminate use by . . . some portion of the general public that includes petitioners and their members." *Id.* at 16 (citations omitted). That, however, is *exactly* what petitioners demonstrated. Petitioners submitted undisputed evidence that the military has intentionally opened exchanges to publishers for the dissemination of petitioners' expressive material, subject only to the satisfaction of neutral criteria such as customer demand and available shelf space. Pet. 3-5; *see also id.* at 17.

2. As its *first* defense of the decision below, the government argues that forum analysis does not apply at all in this context, an unprecedented position that heightens the need for this Court's review.

a. Recognizing that forum analysis applies "in the context of 'restrictions that the government seeks to place on the use of its property,' " Opp. 11 (quoting *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992)), the government argues that public forum analysis does not apply here because the Act "does not restrict any private individual from using government property to engage in expressive activity." Opp. 12. The government does not explain, nor can it, why military exchanges are not "government property," why General Media and other publishers and distributors are not "private individuals," or why dissemination of protected speech is not "expressive activity." *Cf. United States v. Albertini*, 472 U.S. 675 (1985) (military base is government property subject to forum analysis); *Flower v. United States*, 407 U.S. 197 (1972) (same); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 65 n.6 (1963) (citation omitted) (distribution of protected material is protected by the First Amendment); *FW/PBS v. City of Dallas*, 493 U.S. 215 (1990) (same).

b. The government also asserts that forum analysis does not apply because, if the government makes money in a given forum, that government property ceases to be a forum at all. Opp. 12. That startling proposition is completely at odds with this Court's precedents and cases applying those precedents. Case law uniformly indicates that the fact that the government earns money in the forum is merely a factor to consider in determining which *type* of forum exists—designated or nonpublic. *See, e.g., United States v. Kokinda*, 497 U.S. 720, 726 (1990); *New York Magazine*, 136 F.3d at 129 (applying forum analysis to advertising spaces on buses for which city charged a fee, and finding that spaces are designated public fora); *Air Line Pilots Ass'n*, 45 F.3d at 1144 (applying forum analysis to display cases in airports for which

city charged a fee, and finding that spaces are designated public fora); *see supra* at 1-2.

3. The government's defense of the court of appeals' determination that the Act does not discriminate based on viewpoint is equally flawed, and demonstrates the need for clarification of this fundamental constitutional issue. The government's cursory attempt to distinguish *en masse* the numerous federal appellate decisions that have applied this Court's recent viewpoint discrimination precedents in a manner contrary to the court below is unavailing. *See* Opp. 24 n.12. The mere fact that none of the conflicting decisions involved an express dispute about "lasciviousness" does not detract from the central inquiry they all share with this case: whether, given the broad conception of viewpoint discrimination in *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993), and *Rosenberger v. Rector and Visitors of the Univ. of Virginia*, 515 U.S. 819 (1995), the government may discriminate against disfavored viewpoints on sexuality, religion, or other topics under the pretense of treating those viewpoints as self-contained, proscribable "subject matter." [1]

a. Following the court of appeals, *see* Pet. App. 16a-17a & n.12, the government insists that *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), permits boundless discrimination within categories of protected speech and that *Board of Education v. Pico*, 457 U.S. 853 (1982), and *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986), provide *carte blanche* to discriminate against "lascivious" viewpoints. Reliance on these cases is misplaced for two reasons.

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[1] The government's assertion that the Act does not discriminate based on viewpoint because "the Act, by its terms, reaches *all* lascivious magazines, films, and video and audio recordings," Opp. 20 n.9, is disingenuous. The Act favors *nonlascivious* depictions and descriptions of nudity, just as the funding guidelines struck down in *Rosenberger* favored nonreligious student groups. That a burdened class of viewpoints comprises multiple, differing members does not eliminate viewpoint discrimination. *See Rosenberger*, 515 U.S. at 831 (rejecting as "an insupportable assumption" the argument that "no viewpoint discrimination occurs because the Guidelines discriminate against an entire class of viewpoints").

First, the statements on which the court below and the government rely are dicta. *R.A.V.* struck down a municipal ban on bias-motivated speech. *Pico* held that a public school library could not expunge books based on their political viewpoints. *Fraser* upheld a public school's punishment of a student for making an off-color speech. None of those cases presented anything like the question here: the constitutional viability of a broadly drawn ban on "lascivious" depictions of nudity. If the court of appeals and the government were correct about what the Court meant by the cited dicta (and, as explained *infra*, they are not), review of this case still would be important so the Court could either validate or reconsider the sweeping implications of its nonbinding remarks.

Second, as petitioners have explained, *see* Pet. 21-22 & nn.14, 15, the court of appeals' attempt to bring *R.A.V.*, *Pico*, and *Fraser* in line with this case is wholly unconvincing. The government, tracking the reasoning of the court below, *see* Pet. App. 16a & n.12, asserts that *R.A.V.* conclusively defines "lasciviousness" as "not 'idea or viewpoint discrimination,'" Opp. 21 (quoting *R.A.V.*, 505 U.S. at 388), and that the difference between the unprotected speech posited there and the protected speech at issue in this case means nothing. The argument is baffling. The *R.A.V.* dictum says a characteristic that renders a class of speech unprotected makes a fair basis for discrimination. It says nothing about whether "lasciviousness" can describe a viewpoint. Neither *R.A.V.* nor any other decision of this Court supports the Act's unfettered censorship of protected "lascivious" speech.

As for *Pico* and *Fraser*, the government asserts, without any support or rationale, that the results in those cases had nothing to do with the fact that both arose in public schools. *See* Opp. 21-22 n.10. This Court, however, has made clear that the government may ban minors' access to some sexually oriented speech that is fully protected for adults. *See Ginsberg v. New York*, 390 U.S. 629 (1968). This is because "[d]ifferent factors come into play . . . where the interest at stake is the effect of erotic expression

upon children . . . [I]mmaturity, and perhaps other considerations, impose different rules." T. Emerson, "Toward a General Theory of the First Amendment," 72 Yale L.J. 877, 938-39 (1963) (*quoted in Ginsberg*, 390 U.S. at 638 n.6). These considerations have no relevance for the adult military personnel whose access to "lascivious" viewpoints the Act curtails. Cf. *Reno v. ACLU*, 117 S. Ct. 2329, 2346-47 & n.40 (1997).

b. The court of appeals held that the Act's purpose was to avoid the appearance that the military endorsed distasteful ideas and to "promote[] military honor, professionalism, proper decorum, and military 'core values.'" Pet. App. 20a & n.15. The government, apparently recognizing that this purpose reflects viewpoint-based discrimination, tries to cast the Act as *government* speech along the lines of *Rust v. Sullivan*, 500 U.S. 173 (1991), *see* Opp. 22, and thus not subject to First Amendment constraints at all. The comparison is misplaced. In *Rust*, this Court upheld a regulation that limited speech for which the government paid as part of a governmental policy initiative. *See Rust*, 500 U.S. at 198-99. Here, in contrast, Congress has burdened *private* speakers who communicate their *own* messages based on customer demand. *Cf. Rosenberger*, 515 U.S. at 833-34 (distinguishing *Rust* and holding that government "may not discriminate based on the viewpoint of private persons whose speech it facilitates").

The government's assertion that the Act does not implicate the First Amendment because it, "at most, denies petitioners a special benefit," Opp. 23, is equally unsupportable. Reselling magazines at a profit is hardly governmental largesse. In any event, this Court has held repeatedly that withdrawing a benefit carries the same weight under the First Amendment as imposing a burden. *See, e.g., United States v. National Treasury Employees Union*, 513 U.S. 454, 468-69 (1995).

4. Assuming (incorrectly) that exchanges are nonpublic fora and that the Act does not discriminate based on viewpoint, the government and the court below maintain

that the Act passes constitutional muster because it is "reasonable." In so doing, however, they underscore precisely why this Court should grant review.

a. The court below purported to perform a First Amendment reasonableness analysis, but it ratified the government's arguments without requiring any showing that the Act's restriction on speech is "reasonable in light of the purpose served by the forum." *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985). The government explicitly argues that it has no obligation to present *any* evidence that the Act reasonably serves the government's interests. *See* Opp. 25. The government's argument thus confirms that the court below improperly applied a mere rational basis standard, drawn from equal protection doctrine. That standard flatly contradicts the holdings of this Court and other circuits. In applying the *Cornelius* standard, this Court inquires whether the government has presented sufficient evidence to establish that the burden on speech reasonably serves the stated purpose of the forum. *See, e.g., Cornelius*, 473 U.S. at 810-11. Accordingly, appellate courts have demanded that the government present affirmative evidence of reasonableness. *See Tucker v. California Dept. of Educ,*. 97 F.3d 1204, 1211-12 (9th Cir. 1996); *Searcey v. Harris*, 888 F.2d 1314, 1321-22 (11th Cir. 1989). The government attempts to distinguish *Tucker* and *Searcey*, and thus to salvage the court of appeals' aberrant reasonableness analysis, by asserting that a different reasonableness test applies where the regulations at issue "appear[] on their face to be viewpoint discriminatory or counterintuitive." Opp. 25 n.13 (citation omitted). The government fails to explain how or why these factors should alter the test. In any event, the Act creates exactly the same suspicions as did the restrictions in *Tucker* and *Searcey*.

b. Contrary to the government's representation, petitioners are not attempting to import strict scrutiny analysis into the reasonableness inquiry. *See* Opp. 26. Rather, consistent with the analysis of this Court and other cir-

cuits, petitioners contend that the Act's gross imprecision and irrationality in serving the post-enactment asserted interest in protecting the military's image and "core values" fundamentally draws into question whether that is the actual purpose of the Act. *See Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995). As petitioners have emphasized, the Act's ban on some but not all "lascivious" depictions or descriptions of nudity actually will create the perception that the government endorses whatever content is not banned. This is not an "underinclusiveness" problem; rather, it is a problem with the post-enactment endorsement rationale. The government never suggests an answer to that problem. Nor does the government address the apparent conflict between the Fourth Circuit's reasoning in *Tucker*, 97 F.3d at 1215, and the court of appeals' determination that a perception of government endorsement of products sold in exchanges would be reasonable. The government similarly does not attempt to square the court of appeals' refusal to consider simple available alternatives to any "endorsement" problem with the decisions of the Ninth and Fourth Circuits in *Tucker*, 97 F.3d at 1216, and *Multimedia Pub. v. Greenville-Spartanburg Airport Dist.*, 991 F.2d 154, 159 (4th Cir. 1993). Indeed, strikingly absent from the government's opposition is any articulation of how the Act's ban reasonably serves Congress' purported purpose.[2] The explanation is plain—the Act is patently unreasonable.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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[2] Instead, the government inexplicably chastises petitioners for not challenging DOD's authority to ban the same materials from exchanges. *See* Opp. 26-27. But the military has imposed no such ban; indeed, it played no part in the formulation or passage of the Act. Pet. 5-6. Congress imposed the ban, and that congressional action is at issue here. Were the DOD to impose such a ban, petitioners would be free to challenge the constitutionality of that action as well.

Respectfully submitted,

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